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No. 07-1336

In the Supreme Court of the United States

COLLEEN B. WILCOX, ET AL., CROSS-PETITIONERS

v.

UNITED STATES EX REL. JOHN DAVID STONER

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR CROSS-PETITIONERS

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The Ninth Circuit's holding exposes tens of thousands of state officials to *qui tam* actions for mandatory treble damages and per claim penalties under the False Claims Act (FCA) for actions taken within the scope of the defendants' official duties even if those actions did not result in private, pecuniary gain. That ruling conflicts with the law of the Eighth Circuit and multiple district-court rulings from other circuits, conflicts with the logic of two of this Court's recent FCA decisions, and presents pure questions of federal law that are of significant, national importance.

At the Court's request, cross-respondent John David Stoner has filed a response to the cross-

petition for a writ of certiorari. Mr. Stoner has provided no persuasive reason for this Court to leave the Ninth Circuit's far-reaching ruling undisturbed. Accordingly, the cross-petition should be granted.

A. The Ninth Circuit's Decision Created an Acknowledged Circuit Split

The Ninth Circuit's decision, which authorizes *qui tam* suits against state officials related to conduct within the scope of the defendants' official duties, is in direct conflict with the Eighth Circuit's decision in *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001). In *Gaudineer*, the Eighth Circuit held that in order for a *qui tam* relator to assert an FCA cause of action against a state official in his individual capacity, the relator must allege that the official acted outside the scope of his official duties. *Id.* at 937.

In ruling that *qui tam* relators can sue state officials for conduct *within* the scope of their official duties, the Ninth Circuit below expressly recognized that its ruling conflicted with *Gaudineer* and concluded that the contrary reasoning of *Gaudineer* could not be "reconciled with the plain language of the [FCA]." Cross-Pet. App. 13a; *see also United States ex rel. Burlbaw v. Regents of N.M. State Univ.*, 324 F. Supp. 2d 1209, 1215 (D.N.M. 2004) (recognizing legal conclusion reached by the Ninth Circuit below would conflict with *Gaudineer*), *appeal pending sub nom. United States ex rel. Burlbaw v. Orenduff*, No. 06-2006 (10th Cir.). Moreover, as recognized by the *amicus* brief filed by twenty-four States in support of the cross-petition, the circuit split created by the Ninth Circuit's ruling is real and "creates substantial uncertainty for states and state officials

that are considering whether and how to participate in state-federal cooperative programs." *Amici* States Br. 6.

Mr. Stoner's assertion (Br. in Opp. 5-7) that the Ninth Circuit's decision does not conflict with *Gaudineer* places undue reliance on a single footnote in *Gaudineer*. As the cross-petition explained (Cross-Pet. 17 n.7), the *Gaudineer* majority stated that it did not need to decide whether the state-official-defendant was a "person" within the meaning of the FCA's liability provision or whether the Eleventh Amendment barred the relator's suit. *See* 269 F.3d at 937 n.3.

In concluding based on that single footnote that the law of the Eighth Circuit does not conflict with the law of the Ninth Circuit, Mr. Stoner fails to appreciate the broader issue presented by the cross-petition: namely, whether private bounty hunters can prosecute *qui tam* suits under the FCA for mandatory treble damages and per claim penalties against state officials for conduct *within* the scope of the defendants' official duties. That broad issue encompasses two subsidiary legal questions. The first is whether, as a matter of statutory interpretation, a state official is a "person" subject to *qui tam* suits under the FCA for conduct within the scope of their official duties. If so, the second question is whether the Eleventh Amendment nonetheless bars the particular remedy of a private relator's *qui tam* action.

Simply because the Eighth Circuit stated it did not need to reach the subsidiary "person" and Eleventh Amendment questions does not change the fact that the Eighth Circuit decided the broader question

in a manner that conflicts directly with the Ninth Circuit's decision below. *See Gaudineer*, 269 F.3d at 940 (Gibson, J., dissenting) (rejecting majority's scope-of-duty analysis and reaching identical conclusion of Ninth Circuit below).

Mr. Stoner concedes that the Ninth Circuit's ruling conflicts with the multiple district court decisions identified in the cross-petition. He nonetheless argues that those decisions "can be resolved by the circuit courts of appeals." Br. in Opp. 5. Additional percolation in the lower courts is unnecessary, however, and will produce an undue burden on States, state agencies and state officials. As the Department of Justice recently admitted in congressional testimony, the Department does not perform a gatekeeping function to weed-out unmeritorious *qui tam* suits, and, as a result, these suits will continue to be prosecuted against state officials. *See The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 56 (2008).

Now is the time for this Court to decide the threshold question of whether those suits are permissible. *Cf. Wilkie v. Robbins*, 127 S. Ct. 2588, 2605-08 (2007) (holding federal officials are not subject to private RICO actions for treble damages related to conduct within the scope of the defendants' official duties not resulting in private gain).

B. The Questions Presented Are of Significant, National Importance

The importance of the questions presented would independently warrant this Court's review even in

the absence of a circuit split. By his silence, Mr. Stoner concedes that the questions presented by the cross-petition are of national importance. For example, Mr. Stoner makes no attempt whatsoever to respond to the four *amicus* briefs filed in support of the cross-petition.

These *amicus* submissions demonstrate that cross-petitioners' assertion (Cross-Pet. 15, 32-33) that the ruling below will have devastating consequences for state officials and state programs of all types is more than just hollow, the-sky-is-falling rhetoric of an interested party. *See, e.g.*, *Amici* States Br. 2 (explaining that allowing *qui tam* suits against state officials "will create serious practical problems for the day-to-day operation of state programs because they will expose individual state officers and employees to costly and protracted litigation carrying the threat of substantial personal liability and because they will permit any person to bring a back-door challenge to the operation of any state program that receives federal funding"); *Amici* State Agencies Br. 6 (explaining that allowing *qui tam* suits against state officials "will impair the administration of federal-state programs that provide necessary services to citizens and will cause serious administrative problems for state agencies"); Br. *Amici* of Statewide Ass'n of Cmty. Colleges 16 (explaining that allowing *qui tam* suits against state officials "presents a very serious danger to the States," many of which are facing severe budget shortfalls).

The question of whether private bounty hunters can haul state officials into federal court on behalf of the Federal Government raises issues that go to the

very core of our federalist system of government. Now is the time for this Court to decide the threshold question of whether those suits are permissible.

C. This Case Is Ripe for Review and Provides an Excellent Vehicle

1.a. Although Mr. Stoner argues (Br. in Opp. 8) that review in this case would be "premature" due to its interlocutory posture, he does not suggest that anything more need be done for this Court to decide the pure questions of federal law raised by the cross-petition. *See, e.g.*, *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 124 (2003) (deciding whether municipal corporations are "person[s]" subject to *qui tam* suits after court of appeals reinstated suit following dismissal by district court); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 770 (2000) (deciding whether States and state agencies are "person[s]" subject to *qui tam* suits after court of appeals affirmed district court's denial of motion to dismiss). Furthermore, if this Court were to decide the questions presented in favor of cross-petitioners, such a ruling would dispose of this case in its entirety.

b. Mr. Stoner also suggests (Br. in Opp. 8) that the petition should be denied because the Ninth Circuit ordered the case dismissed on remand if Mr. Stoner fails to obtain *pro hac vice* admission or to retain counsel. According to Mr. Stoner, "it is unclear whether the local rules would permit such admission because he is a California resident" (*id.*) and Mr. Stoner's "efforts to obtain trial counsel have not yet been *finalized*" (*id.* at 8 n.5) (emphasis added). Mr. Stoner is a well-educated lawyer who has retained counsel to prosecute his parallel state suit,

the dismissal of which was recently affirmed on appeal. *See California ex rel. Stoner v. Santa Clara County Office of Educ.*, No. H031576, 2008 WL 2310357 (Cal. Ct. App. 6th Dist. June 5, 2008). Given the tenacity with which he has prosecuted this suit over the past five years, cross-petitioners have no doubt, and neither should this Court, that Mr. Stoner would obtain *pro hac vice* admission or retain counsel were this case remanded to the district court.

c. The pendency of false claims legislation in Congress, Mr. Stoner contends, "makes interlocutory review at this early juncture especially inappropriate." Br. in Opp. 10. Neither of the pending bills he cites addresses the question of whether state officials are proper *qui tam* defendants. *See* S. 2041, 110th Cong. (2007); H.R. 4854, 110th Cong. (2007). Even if they did, neither bill has reached the floor of its respective House of Congress, and with what little time remains before adjournment of the 110th Congress, it remains extremely unlikely that any such legislation will be enacted.

2.a. Mr. Stoner's strained effort to narrow the scope of the Ninth Circuit's sweeping ruling also lacks merit. According to Mr. Stoner, this case "is a particularly inapt vehicle for consideration of [the questions presented] because it concerns the liability of *district* and *county* education officials." Br. in Opp. 10 (emphasis in original). However, by its express terms, the Ninth Circuit's holding applies to *state* officials of all types, a fact evidenced by the wide variety of state interests represented in the several *amicus* submissions filed in support of the cross-petition. Moreover, this Court has already denied Mr. Stoner's petition for a writ of certiorari

challenging the Ninth Circuit's ruling that cross-petitioners are properly classified as state officials, 128 S. Ct. 1728 (2008), and thus that issue is no longer subject to dispute.[1]

b. The only vehicle problem that may have militated against issuance of the writ—Mr. Stoner's *pro se* status—is no longer present. Mr. Stoner acted *pro se* in the district court and before the court of appeals. To the extent that Mr. Stoner's *pro se* status may have counseled against granting the cross-petition when it was first filed, that consideration no longer exists. Mr. Stoner has retained counsel with extensive experience litigating matters before this Court. As a result, the Court can issue the writ "satisfied that the relevant issues [will be] fully aired." *Clay v. United States*, 537 U.S. 522, 526 n.2 (2003).

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[1] To the extent that Mr. Stoner's citation (Br. in Opp. 8 n.4) of the pending *Burlbaw* appeal is meant to suggest that *Burlbaw* will provide a better vehicle to decide the questions presented by the cross-petition, he is mistaken. There is a substantial possibility that the Tenth Circuit will not reach the questions presented by the cross-petition, but instead will assume their answers in addressing the less difficult question of whether the district court correctly dismissed the suit on qualified immunity grounds. *See United States ex rel. Burlbaw v. Orenduff*, 400 F. Supp. 2d 1276 (D.N.M. 2005), *appeal pending*, No. 05-2393 (10th Cir.). The threshold issue of whether state officials are proper *qui tam* defendants is only asserted in *Burlbaw* as a cross-appeal of the district court's 2004 ruling, and as such the threshold issue, which is squarely raised by this case, may never be decided by the Tenth Circuit.

D. Mr. Stoner's Argument on the Merits Fails to Supply the Logic Missing from the Ninth Circuit's Flawed Decision

The Ninth Circuit's ruling is correct, Mr. Stoner contends, because the FCA's text, history and purpose suggest state officials should be subject to *qui tam* suits. He is mistaken. More important for present purposes, however, is the fact that Mr. Stoner does not directly contest cross-petitioners' assertion that the Ninth Circuit's ruling is inconsistent with the logic of *Stevens* and *Chandler*, both of which teach that the intent of the 1863 Congress controls the question of who or what is a "person" amenable to *qui tam* suits under the FCA. Implicitly recognizing that the Ninth Circuit's unquestioned application of *Hafer v. Melo*, 502 U.S. 21 (1991), runs counter to *Stevens* and *Chandler*, Mr. Stoner attempts to supplement the Ninth Circuit's flawed decision by engaging in the type of analysis the court of appeals failed to perform. That effort fails.

In support of his argument that the FCA's use of the word "person" should be read to include state officials acting in their official capacity, Mr. Stoner cites language in the FCA limiting the liability of certain federal officials. Br. in Opp. 12. Mr. Stoner neglects to mention that the language he cites was added to the FCA in 1986. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (codified at 31 U.S.C. § 3730(e)(1), (2)); *see also* 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.03[A] at 4-124.1 (3d ed. Supp. 2008) (explaining legislative language was added out of concerns regarding "politically motivated" *qui tam* suits against federal officials, "although, arguably,

these concerns were addressed by other immunities already extant"). These statutory amendments provide no evidence regarding the intent of the 1863 Congress. *See Stevens*, 529 U.S. at 783 n.12 (rejecting use of 1986 amendments for discerning meaning of 1863 Congress's use of the word "person").

Congress knows how to enact specific statutory language providing for state-official liability when it intends civil statutes of general applicability to be so applied. *See* Cross-Pet. 26 n.9 (listing examples). In arguing that the FCA, which contains no such language, was meant to reach state officials acting in their official capacities, Mr. Stoner relies on the very same "legislative history" this Court rejected in *Stevens*. The 1862 House report Mr. Stoner cites was found to be irrelevant in *Stevens*, not only because it was issued by only one committee of one House of Congress, but because it was not issued in connection with the 1863 Act or any other proposed false claims legislation. *Stevens*, 529 U.S. at 783 n.12. This Court also found that the 1862 report did not describe conduct by state officials directed against the Federal Government, and as such the 1862 report did not suggest that the 1863 Congress intended to regulate the conduct of state actors via the FCA. *Id.*; *see also United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 876 (D.C. Cir. 1999) (noting that 1862 report discussed examples of certain state officials who had used war contracts for *personal* profit and examples of fraud were *not* directed against the United States).

Mr. Stoner cites no legislative history directly related to the 1863 Act, let alone anything else suggesting that Congress intended to set loose an army

of bounty hunters on state officials for conduct within the scope of their official duties not resulting in private, pecuniary gain. In Mr. Stoner's view, the FCA is an all-encompassing fraud statute. As this Court's decisions make clear, however, the FCA "was not designed to reach every kind of fraud practiced on the [Federal] Government," *United States v. McNinch*, 356 U.S. 595, 599 (1958), nor was it intended to "cover all types of *fraudsters*," *Stevens*, 529 U.S. at 781 n.10 (emphasis in original); *see also Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2130 (2008) (rejecting interpretation rendering FCA "an all-purpose anti-fraud statute").

The FCA was designed to "ferret[] out and punish[]" frauds upon the Federal Government. Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Wilson); *see also* Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Howard) (describing FCA's *qui tam* provision as a "mode of proceeding to punish persons"). Such a statute is extremely ill-suited for application against state officials related to conduct within the scope of their official duties not resulting in private, pecuniary gain. *Cf. Wilkie*, 127 S. Ct. at 2606-07. This is especially true when the statute's awesome power is wielded by private bounty hunters who are largely unaccountable for their actions.

Lastly, Mr. Stoner's reformulation of the questions presented (Br. in Opp. i) should be rejected because it assumes the answer to one of the core legal questions raised by this dispute: namely, whether the 1863 Congress recognized the distinction between official-capacity and personal-capacity

suits brought by private individuals against state officials for injuries not sustained by the private individuals themselves. *See* N.M. State Univ. *Amicus* Br. 7 (arguing distinction was not recognized at time of FCA's 1863 enactment); Br. *Amici* of Statewide Ass'n of Cmty. Colleges 5 (same). In addition, this case does not ask whether the United States may prosecute FCA suits against state officials; this case asks only whether *qui tam* relators may prosecute such suits. *See Stevens*, 529 U.S. at 789 (Ginsburg, J., concurring) (recognizing importance of distinction).

* * * * *

For the reasons stated above, in the cross-petition and in the four *amicus* briefs filed in support of cross-petitioners, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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